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# Taking Judicial Legitimacy Seriously

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## TAKING JUDICIAL LEGITIMACY SERIOUSLY

LUIS FUENTES-ROHWER\*

“And if you’re the intelligent man on the street and the Court issues a decision,” explained Chief Justice Roberts in the oral argument in *Gill v. Whitford*, the blockbuster partisan gerrymandering case out of Wisconsin, “and let’s say, okay, the Democrats win, and that person will say: ‘Well, why did the Democrats win?’”<sup>1</sup> The answer would be based on what the Chief Justice labeled later in the oral argument as “sociological gobbledygook.”<sup>2</sup> But our man on the street is much too cynical for that. He will know “that’s a bunch of baloney.”<sup>3</sup> The fancy methodological gymnastics will not be enough to disguise for our man on the street that “[i]t must be because the Supreme Court preferred the Democrats over the Republicans.”<sup>4</sup> And once this happens, the Chief Justice concluded, it will “cause very serious harm to the status and integrity of the decisions of this Court in the eyes of the country.”<sup>5</sup>

This is not a new worry for the Chief Justice. During his confirmation hearing, in response to a question by Senator Hatch about the Court’s apparent refusal to surrender to political pressure in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, Chief Justice Roberts agreed that “considerations about the Court’s legitimacy are critically important.”<sup>6</sup> The Justices must “recognize that their role is a limited one. That is the basis of their legitimacy.”<sup>7</sup> They must decide only cases and controversies, and must do so on the basis of law and not “on any view of what’s the best policy.”<sup>8</sup> To go beyond that limited role and “start making the law . . . raises legitimate concerns about [the] legitimacy of their authority to do that.”<sup>9</sup> Notably, then-Senator Sessions agreed, observing that “the

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1. Transcript of Oral Argument at 37, *Gill v. Whitford*, 137 S. Ct. 2268 (2017) (No. 16-1161).

2. *Id.* at 40.

3. *Id.* at 38.

4. *Id.*

5. *Id.*

6. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 143 (2005).

7. *Id.* at 256.

8. *Id.* at 161.

9. *Id.* at 353.

American people are beginning to believe that is occurring, and I think it does threaten legitimacy of the Court in a way that all of us who love the law should be concerned.”<sup>10</sup> Sessions cabined the threat to legitimacy for “these kinds of activist cases.”<sup>11</sup>

This is not a unique worry. For example, Justice Frankfurter similarly argued that the Court must carefully nourish public confidence in its work, by “complete detachment . . . from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements.”<sup>12</sup> A similar concern animated the Court’s joint opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>13</sup> and Justice Stevens’s dissenting opinion in *Bush v. Gore*.<sup>14</sup> The argument traces as far back as 1788, when Alexander Hamilton counseled that the judicial branch “may truly be said to have neither FORCE nor WILL, but merely judgment.”<sup>15</sup> Chief Justice Roberts is in distinguished company.<sup>16</sup>

This Essay situates the Chief Justice’s comments within a growing empirical literature on the concept of judicial legitimacy. The Essay asks two questions. First, what drives Chief Justice Roberts’s comments about the legitimacy of the Court? More importantly, how are the concerns he voices during his confirmation hearing similar to the concerns he raises during the *Gill* oral argument? And second, is the Chief Justice right to be

10. *Id.*

11. *Id.*

12. *Baker v. Carr*, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting). See generally Guy-Uriel Charles, *Constitutional Pluralism and Democratic Politics: Reflections on the Interpretive Approach of Baker v. Carr*, 80 N.C. L. REV. 1103 (2002).

13. See generally 505 U.S. 833 (1992); Tom R. Tyler & Gregory Mitchell, *Legitimacy and the Empowerment of Discretionary Legal Authority*, 43 DUKE L.J. 703 (1994).

14. 531 U.S. 98, 128–29 (2000) (Stevens, J., dissenting) (“Although we may never know with complete certainty the identity of the winner of this year’s Presidential election, the identity of the loser is perfectly clear. It is the Nation’s confidence in the judge as an impartial guardian of the rule of law.”); see ALAN M. DERSHOWITZ, *SUPREME INJUSTICE: HOW THE HIGH COURT HIJACKED ELECTION 2000*, at 5–6 (2001) (“[T]here is . . . widespread popular outrage at what the high court did . . . [and when the Court members] act in an unprincipled and partisan manner—as they did in *Bush v. Gore*—they risk losing respect and frittering away the moral capital accumulated by their predecessors over generations.”).

15. THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

16. Scholars have raised similar concerns. See, e.g., Jeffery J. Mondak, *Substantive and Procedural Aspects of Supreme Court Decisions and Determinants of Institutional Approval*, 19 AM. POL. Q. 174, 174 (1991); John M. Scheb II & William Lyons, *Judicial Behavior and Public Opinion: Popular Expectations Regarding the Factors that Influence Supreme Court Decisions*, 23 POL. BEHAV. 181, 182 (2001); Jeffrey L. Yates & Andrew B. Whitford, *The Presidency and the Supreme Court After Bush v. Gore: Implications for Institutional Legitimacy and Effectiveness*, 13 STAN. L. & POL’Y REV. 101 (2002).

concerned? This is another way of asking, “[w]hat exactly could the Court do to undermine its legitimacy?”<sup>17</sup>

The Essay answers these questions in three Parts. Part I offers a definition of judicial legitimacy as acceptance of the Court as a constitutional branch, measured by public opinion polls. This version of judicial legitimacy is known as “diffuse support.” Part II equates judicial legitimacy with compliance and looks carefully at the interaction between the Court and the publics asked to bear the brunt of the Court’s particular mandates. This definition is known as “content legitimacy.” This Essay explains in Part III that the Chief Justice is wrong on both counts. The Court’s legitimacy is generally secure. He is right to worry, but not for the reasons he posits. The legitimacy of the Court is secure so long as the Justices reach their decisions through principled decision-making processes, as opposed to behaving strategically, which the public may perceive as politically motivated. The man on the street does not care that the Court appears to side with one party over the other. He only cares that the Court follows a principled process.

In fact, if the Chief Justice is truly worried about what the man on the street thinks and how he perceives the Court and its work, *Gill v. Whitford* should be the least of his concerns. In *Janus v. American Federation of State, County and Municipal Employees, Council 31*,<sup>18</sup> the Court returns to the question of public sector unions for the third time, and whether unwilling employees may be forced to pay “fair share” fees. The man on the street cannot possibly mistake *Janus* for anything other than a judicial foray into a politically charged controversy. He will know that a decision striking down public sector union fees, which will require overturning a forty-year-old precedent, “must be because the Supreme Court preferred the [Republicans and their wealthy donors] over the [Democrats].”<sup>19</sup> Yet the Chief Justice does not seem concerned. Thus the larger question, which this Essay takes up briefly in Part III: What lies behind these general calls for safeguarding the Court’s judicial legitimacy?

17. Dion Farganis, *Is the Supreme Court Bulletproof? Testing the Limits of Legitimacy with a New Experimental Design* 3 (Apr. 3, 2008) (unpublished manuscript) (emphasis omitted), [http://research.allacademic.com/one/mpsa/mpsa08/index.php?click\\_key=1#search\\_top](http://research.allacademic.com/one/mpsa/mpsa08/index.php?click_key=1#search_top) [<https://perma.cc/28UY-BXKP>].

18. 851 F.3d 746 (7th Cir.), *cert. granted*, 138 S. Ct. 54 (2017).

19. See Transcript of Oral Argument, *supra* note 1, at 38.

## I.

In his dissenting opinion in *Baker v. Carr*, Justice Frankfurter lambasted a court majority for entering into the famed political thicket while attempting to remedy gross population disparities. His reasons were forthright and prudential: "The Court's authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction."<sup>20</sup> This is an old admonition. Publius told us as much while defending the virtues of the judiciary: "It may truly be said to have neither FORCE nor WILL but merely judgment."<sup>21</sup> Decades later, Alexis de Tocqueville expressed a similar view while commenting on the power of judicial review: "Their [Supreme Court Justices'] power is immense; but it is a power of opinion. They are omnipotent as long as the people consent to obey the law; they can do nothing when they scorn it."<sup>22</sup>

This is a view of judicial legitimacy as institutional loyalty. This is the idea that the public accepts and supports the Court as constitutional interpreter irrespective of particular outcomes reached or positions taken. This version of judicial legitimacy is known as "diffuse support." This is a claim of public confidence about the Court and its work,<sup>23</sup> a confidence measured by thermometer readings of public support for the Court.<sup>24</sup> At the heart of this view of legitimacy is the mythic perception of the Court as a symbol of justice and liberty,<sup>25</sup> or what Walter Murphy labeled the "cult of the

20. *Baker v. Carr*, 369 U.S. 186, 267 (Frankfurter, J., dissenting); see also Gregory A. Caldeira, *Neither the Sword nor the Purse: The Dynamics of Public Confidence in the United States Supreme Court*, 80 AM. POL. SCI. REV. 1209, 1209 (1986) (concluding that the judicial branch must "depend to an extraordinary extent on the confidence, or at least the acquiescence, of the public").

21. See THE FEDERALIST NO. 78, *supra* note 15; *United States v. Butler*, 297 U.S. 1, 62–63 (1935) ("All the Court does, or can do, is to announce its considered judgment upon the question [in front of it]. The only power it has, if such it may be called, is the power of judgment.").

22. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 142 (Harvey C. Mansfield & Delba Winthrop eds. & trans., Univ. of Chi. Press 2000) (1835). For extended discussions of this view of the Court *vis-à-vis* public opinion, see generally William Mishler & Reginald S. Sheehan, *The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions*, 87 AM. POL. SCI. REV. 87 (1993); Helmut Norpoth & Jeffrey A. Segal, *Response, Popular Influence on Supreme Court Decisions*, 88 AM. POL. SCI. REV. 711 (1994).

23. See Peter H. Schuck, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics*, 87 COLUM. L. REV. 1325, 1383 (1987).

24. See generally STEVEN J. ROSENSTONE ET AL., INTER-UNIV. CONSORTIUM FOR POLITICAL & SOC. RESEARCH, ICPSR 2282, AMERICAN NATIONAL ELECTION STUDY: 1997 PILOT STUDY (1998), <https://www.icpsr.umich.edu/icpsrweb/ICPSR/studies/2282#cite> [<https://perma.cc/AD52-928F>].

25. See, e.g., Edward S. Corwin, *The Constitution as Instrument and as Symbol*, 30 AM. POL. SCI. REV. 1071, 1072 (1936); Max Lerner, *Constitution and Court as Symbols*, 46 YALE L.J. 1290 (1937); see also Larry R. Baas & Dan Thomas, *The Supreme Court and Policy Legitimation: Experimental Tests*, 12 AM. POL. Q. 335, 336 (1984) ("It has long been part of the folklore of American politics—if not the conventional wisdom of political science—that Supreme Court mandates warrant popular acceptance because the Court can lay institutional claim to a public image as the polity's conscience."). For a more nuanced discussion of the development of the Court's mythical vision, see David Adamany,

robe.”<sup>26</sup> Courts are special, they are different, and it is for those reasons that they are respected and their edicts are obeyed.<sup>27</sup> Studies conclude that the public accepts the legitimacy of the Court,<sup>28</sup> even in the face of rulings with which the relevant publics disagree. But there is a caveat. Legitimacy is about loyalty, which is sustained through the special and symbolic status of the Court. It follows that the public remains loyal to the Court and its rulings so long as the symbols hold and the Court is viewed as unique.<sup>29</sup>

As a consequence, judicial legitimacy is compromised if the public comes to view the Court as “just another political institution.”<sup>30</sup> This is not the same as ideological disagreements with specific judicial outcomes or a belief in the tenets of legal realism and the role played by ideology in judicial decision making. Rather, this is the view that the Court is not unique and undeserving of both loyalty and an independent interpretive space. This is the view, in other words, that the Justices are nothing but “politicians in robes.”<sup>31</sup> Worries about the loss of judicial legitimacy are thus overwrought and strategic in their own right. The public does not expect the Justices to behave as mechanical, non-ideological purveyors of legal principles.<sup>32</sup> Notably, the public is both aware and accepting of the role that discretion plays in judicial decision-making. The legitimacy of the Court is secure so long as this discretion “is being exercised in a principled, rather than strategic, way.”<sup>33</sup> Risks to judicial legitimacy *do* arise when legal arguments do

*Legitimacy, Realigning Elections, and the Supreme Court*, 1973 WIS. L. REV. 790, 790–92 (1973); Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolution*, 82 VA. L. REV. 1, 18–31 (1996).

26. WALTER MURPHY, *ELEMENTS OF JUDICIAL STRATEGY* 13 (1964) (defining “[t]he cult of the robe” as “the concept of the judge as a high priest of justice with special talents for elucidation of ‘the law,’ that sacred and mysterious text which is inscrutable even to the educated layman,” and explaining that this conception of the judicial role “forms a sort of institutional charisma which is bestowed on judges with their oath of office”).

27. See James L. Gibson, *Challenges to the Impartiality of State Supreme Courts: Legitimacy Theory and “New-Style” Judicial Campaigns*, 102 AM. POL. SCI. REV. 59, 61 (2008).

28. See generally Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. POL. SCI. 635 (1992); James L. Gibson et al., *The Supreme Court and the U.S. Presidential Election of 2000: Wounds, Self-Inflicted or Otherwise?*, 33 BRIT. J. POL. SCI. 535 (2003).

29. See Gibson, *supra* note 27, at 71.

30. James L. Gibson & Michael J. Nelson, *Reconsidering Positivity Theory: What Roles Do Politicization, Ideological Disagreement, and Legal Realism Play in Shaping U.S. Supreme Court Legitimacy?*, 14 J. EMPIRICAL LEGAL STUD. 592, 592 (2017); see also JAMES L. GIBSON & GREGORY A. CALDEIRA, *CITIZENS, COURTS, AND CONFIRMATIONS: POSITIVITY THEORY AND THE JUDGMENTS OF THE AMERICAN PEOPLE* (2009).

31. Gibson & Nelson, *supra* note 30, at 595.

32. James L. Gibson & Gregory A. Caldeira, *Has Legal Realism Damaged the Legitimacy of the US Supreme Court?*, 45 LAW & SOC’Y REV. 195 (2011).

33. Gibson & Caldeira, *supra* note 32, at 213. For scholars who defend the Court and its exercise of discretion, even in politically motivated ways, see TERRI JENNINGS PERETTI, *IN DEFENSE OF A*

not “stay within a rather large perimeter of holdings and rationales”<sup>34</sup> and judicial behavior strays from accepted norms.<sup>35</sup>

This is where Chief Justice Roberts’s concerns arise most forcefully. The Court must exercise “principled discretion.” But the Court’s behavior in the last generation does not support his case; in fact, it points in the opposite direction. Consider first one of the most notorious judicial interventions of the last generation: the disputed recount in Florida after the 2000 presidential election.<sup>36</sup> The facts are straightforward. Vice President Gore asked for a recount and the Florida Supreme Court agreed with him. Governor Bush turned to the federal courts and appealed the ruling. On December 4, the U.S. Supreme Court partially agreed with him and directed the Florida courts to pay careful attention to federal law. Gore then returned to state court and asked for a recount yet again, which the Florida Supreme Court granted in a surprising decision. This second time, on December 8, the Florida Supreme Court concluded that the recount must include not only those uncounted ballots in Miami-Dade County but also all remaining “undercounts” throughout the state. This opinion surprised many, for it was assumed that Gore had run out of time and that the Florida Supreme Court, while sympathetic, would move aside and let the existing final count stand. Instead, by the narrowest of margins, the Court responded and breathed life into Gore’s fledgling hopes. Bush appealed and on December 12, the U.S. Supreme Court issued a ruling that, for all intents and purposes, ended the dispute.

This scenario raises many important questions. First came the second Florida Supreme Court opinion, issued on December 8. This opinion may be seen as implicitly defying the U.S. Supreme Court.<sup>37</sup> Why did the state supreme court choose this route? It may very well be that they felt strongly about their position and the constitutional values at issue. It may also be true that they let their ideological pre-commitments get in the way of their

POLITICAL COURT 188 (1999) (concluding that “continued legitimacy *demands* that the Court be policy motivated, and thus, politically sensitive and responsible in the exercise of its power”). and Thomas W. Merrill, *A Modest Proposal for a Political Court*, 17 HARV. J.L. & PUB. POL’Y 137, 138–39 (1994) (“The legitimacy of the Court would in fact be enhanced rather than diminished if the Court renounced the idea that its decisions are compelled by law, and instead openly acknowledged that it exercises political discretion.”).

34. Farganis, *supra* note 17, at 29.

35. See generally Michael J. Nelson & James L. Gibson, *U.S. Supreme Court Legitimacy: Unanswered Questions and an Agenda for Future Research*, in ROUTLEDGE HANDBOOK OF JUDICIAL BEHAVIOR 132–50 (Robert M. Howard & Kirk A. Randazzo eds., 2018).

36. See *Bush v. Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70 (2000) (per curiam); *Bush v. Gore*, 531 U.S. 1046 (2000) (mem.); *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam).

37. Cf. Del Dickson, *State Court Defiance and the Limits of Supreme Court Authority: Williams v. Georgia Revisited*, 103 YALE L.J. 1423, 1456 (1994).

better judgement. After all, they knew, or should have known, how the U.S. Supreme Court would ultimately rule, so why test its mettle? Why not take the prudential road? But these questions elide a more important issue: The state supreme court decided a question of *state law*. The state court decision was a test to the Supreme Court and how far the conservative Justices were willing to go.

The U.S. Supreme Court had many options. In light of prior ideological and substantive commitments to our federal structure—namely, the conservative commitment to our federalism—we expected the conservative Justices to step aside and allow the state of Florida to resolve its own disagreements under state law. Ultimately, Congress could join the dispute. This is straight out of Frankfurter's playbook. Or else, the U.S. Supreme Court could stay the Florida ruling and seek to end the controversy once and for all. The U.S. Supreme Court chose the latter path and in so doing raised important prudential and doctrinal questions. Both questions directly inform my larger inquiry.

The doctrinal path taken by the conservative Justices raised many eyebrows. On equal protection grounds, the Court concluded that “[h]aving once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person’s vote over that of another.”<sup>38</sup> This language calls to mind the Court’s deferential standard of review. But that is not the standard the Court applied. More importantly, this is a difficult position to defend, even for the Justices who espoused it.<sup>39</sup> But that is precisely the point. Legitimacy as fidelity offers the Justices a very forgiving standard for measuring judicial behavior. This is true even in the face of a political context that posited the Court as a crass, partisan actor. In fact, this is precisely the concern that animates Chief Justice Roberts’s worries in *Gill*. The man on the street could not help but view the Court’s intervention as anything but crassly partisan. More crucially, the case proffers a poignant example of a time when the Court should wade into political waters carefully. Analyses in the wake of *Bush v. Gore*, however, concluded that the Court’s legitimacy remained largely unaffected.<sup>40</sup> If *this* case did not harm the Court’s legitimacy in any noticeable way, will any case ever will?

38. *Bush*, 531 U.S. at 104.

39. *See id.* at 109 (“Our consideration is limited to the present circumstances.”).

40. *See generally* Gibson et al., *supra* note 28; Michael J. Klarman, *Bush v. Gore Through the Lens of Constitutional History*, 89 CAL. L. REV. 1721 (2001); John C. Yoo, *In Defense of the Court’s Legitimacy*, 68 U. CHI. L. REV. 775 (2001).



Chief Justice Roberts provides us with two more recent example of the forgiving nature of the “reservoir of goodwill”<sup>41</sup> that the public extends to the Court. The first case is *National Federation of Independent Business v. Sebelius*.<sup>42</sup> The Court faced a challenge to the Affordable Care Act, and specifically its individual mandate, which required those individuals not exempted by the Act to purchase their own health insurance or else face a “shared responsibility” penalty. In a 5–4 decision authored by the Chief Justice, the Court concluded both that the suit was not barred by the Anti-Injunction Act because Congress did not intend the individual mandate to be treated as a tax, but as a penalty; but also that the individual mandate was a valid exercise of Congressional power as a tax under the Taxing Clause.<sup>43</sup> Thus, the Individual Mandate was simultaneously a tax and not a tax. More importantly, this was a surprising position for the Chief Justice to take, especially since he was rumored to be a dissenting vote in the case. His vote in *Sebelius*, in fact, is known as the “Roberts Flip,”<sup>44</sup> a strategic move to safeguard the Court’s legitimacy.<sup>45</sup> The irony is inescapable. In attempting to safeguard the legitimacy of the Court, the Chief Justice behaved precisely as social science warns him not to behave.

A second case is *Shelby County v. Holder*.<sup>46</sup> In *Shelby County*, the Court struck down section 4(b) of the Voting Rights Act—its coverage formula—under its particularized reading of “basic principles” of federalism.<sup>47</sup> The conclusion is itself unsurprising, particularly for a conservative Court. But the subtext of the opinion, written by Chief Justice Roberts, raises questions at the heart of his larger concerns about judicial legitimacy. In *Shelby County*, the law as it then existed did not help the Court majority much. The argument was whether Congress could treat the states differently, as it did under the coverage formula. For the Court in 2013, the Consti-

41. DAVID EASTON, A SYSTEM ANALYSIS OF POLITICAL LIFE 273 (1965) (defining “diffuse support” as “a reservoir of favorable attitudes or good will that helps members to accept or tolerate outputs to which they are opposed or the effects of which they see as damaging to their wants”).

42. 567 U.S. 519 (2012).

43. *Id.* at 543–47, 574.

44. See Jan Crawford, *Roberts Switched Views to Uphold Health Care Law*, CBS NEWS (July 2, 2012, 9:43 PM), <https://www.cbsnews.com/news/roberts-switched-views-to-uphold-health-care-law/> [<https://perma.cc/6SLF-WHPP>].

45. See Tonja Jacobi, *Obamacare as a Window on Judicial Strategy*, 80 TENN. L. REV. 763 (2013); Timothy Noah, *States of Confusion*, NEW REPUBLIC (July 12, 2012), <https://newrepublic.com/article/104887/trb-states-confusion-john-roberts-healthcare> [<https://perma.cc/ZF8R-DTWM>] (“The Supreme Court’s decision in the health care case is best understood as an attempt to maximize damage to established legal precedent . . . Roberts wanted to avoid getting pilloried as a rightwing extremist who doesn’t care whether people get health insurance or not.”).

46. 133 S. Ct. 2612 (2013).

47. *Id.* at 2631.

tution established a “fundamental principle of equal sovereignty”<sup>48</sup> between the states. The problem was that the relevant legal materials did not so hold. In fact, the relevant precedent, *South Carolina v. Katzenbach*, held the exact opposite. Rather than simply overrule the case, Chief Justice Roberts distorted the meaning of a key passage in *South Carolina* and pretended that the case supported his conclusion. It did not. Not even close.<sup>49</sup> But this was nothing that a few key deletions and ellipses could not cure: “The doctrine of the equality of States, ~~invoked by South Carolina,~~ does not bar ~~this approach, for that doctrine applies only to the terms upon which States are admitted to the Union, and not to the remedies for local evils which have subsequently appeared.~~”<sup>50</sup> The opinion is not even sophistry. This is a sleight of hand.

Observers are entitled to ask whether the *Shelby County* opinion compromises the Court’s legitimacy as Chief Justice Roberts understands the concept. Thankfully for the Chief Justice, the Court’s legitimacy does not hinge on the quality of its written work.<sup>51</sup> In fact, the public gives the Justices a great deal of interpretive space within which to craft its opinions. According to a recent study, “[o]nly the most radical and extreme decisions appear able to put a dent in public loyalty to the Court. Put differently, provided the Justices stay within a rather large perimeter of holdings and rationales, the Court’s legitimacy is secure.”<sup>52</sup>

The implications of *Bush*, *Sebelius*, and *Shelby County* are clear for the *Gill* case. The same Court that found a doctrinal way out of the morass of the 2000 election can find a doctrinal way out the gerrymandering mess, even in the face of partisanship critiques. The legitimacy of the Court needn’t be compromised. Similarly, the same Chief Justice who penned the *Sebelius* and *Shelby County* opinions would find a similar path to his desired conclusion in *Gill*. This is not a question of law or standards, as *Sebelius* and *Shelby County* show. Abstract concerns about judicial legitimacy are not a good reason for the Court to decide not to decide. Chief Justice Roberts clearly knows better.

48. *Id.* at 2623 (quoting *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009)).

49. See Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *State’s Rights, Last Rites, and Voting Rights*, 47 CONN. L. REV. 481, 483–84 (2014).

50. See *id.* at 519–20 (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 328–29 (1966)). The strikethrough is the original language from *Katzenbach* that was excluded by Chief Justice Roberts in *Northwest Austin*, 557 U.S. at 203, which Roberts then relied upon for his opinion in *Shelby County*.

51. See Dion Farganis, *Do Reasons Matter? The Impact of Opinion Content on Supreme Court Legitimacy*, 65 POL. RES. Q. 206, 214 (2012).

52. Farganis, *supra* note 17, at 29.

## II.

A second view of judicial legitimacy argues that a recalcitrant public will not comply with the Court's decision simply because the Court demands it. This version of judicial legitimacy is known as "content legitimacy."<sup>53</sup> This is a version of legitimacy as compliance. It asks whether "citizens are more likely to comply with [the Court's] decisions, *even when they are unpopular*."<sup>54</sup> The point is whether the public will accept the Court's edicts precisely because the Court issues them. In the abstract, this version of legitimacy as compliance does not find support in the available data.<sup>55</sup> Judicial endorsement of a particular policy will not lead to mass acceptance.<sup>56</sup> But this is too simplistic. The power to exert compliance from one's rulings invokes a complex array of institutional and social factors.<sup>57</sup> The relevant question is this: when do the affected parties comply or resist a given judicial mandate?

53. See Adamany, *supra* note 25, at 802.

54. James L. Gibson, *Understandings of Justice: Institutional Legitimacy, Procedural Justice, and Political Tolerance*, 23 LAW & SOC'Y REV. 469, 472 (1989); see Adamany, *supra* note 25, at 802 (defining the "legitimacy-conferring power" of the Court as the power to "generate consent," to "create acceptance of policy among those who oppose or are neutral about its substance and heighten acceptance among those already committed to its content"); RICHARD M. JOHNSON, THE DYNAMICS OF COMPLIANCE: SUPREME COURT DECISION-MAKING FROM A NEW PERSPECTIVE 143, 149 (1967) (explaining that the Court engenders the impression of "majestic fairness, reasonableness, and expertness," and that this impression is crucial, for it may lead individuals to comply with Court rulings even if in disagreement with them); Michael J. Petrick, *The Supreme Court and Authority Acceptance*, 21 W. POL. Q. 5, 5-6 (1968) This research is similar to the impact studies literature, which also defined the Court's effect as a question of compliance/noncompliance. See Stephen L. Wasby, *The Supreme Court's Impact: Some Problems of Conceptualization and Measurement*, 5 LAW & SOC'Y REV. 41, 42 (1970).

55. See David Adamany & Joel B. Grossman, *Support for the Supreme Court as a National Policy Maker*, 5 LAW & POL'Y Q. 405, 407 (1983); Baas & Thomas, *supra* note 25; Gibson, *supra* note 54 (finding that the Court's ability to elicit acceptance from those who disagree with its conclusions is minimal at best); Dean Jaros & Robert Roper, *The U.S. Supreme Court: Myth, Diffuse Support, Specific Support, and Legitimacy*, 8 AM. POL. Q. 85, 92 (1980); Walter F. Murphy & Joseph Tanenhaus, *Publicity, Public Opinion and the Court*, 84 NW. U. L. REV. 985, 1005 (1989). But see Valerie J. Hoekstra & Jeffrey A. Segal, *The Shepherding of Local Public Opinion: The Supreme Court and Lamb's Chapel*, 58 J. POL. 1079, 1097 (1996) (questioning the conclusion that the Court has no ability to legitimize policy decisions).

56. Baas & Thomas, *supra* note 25, at 351-52. The Court does, however, have some limited ability to elicit acceptance for unpopular rulings from opinion leaders. See Gibson, *supra* note 54. For criticisms of the relevant research, see Gregory A. Caldeira, *Courts and Public Opinion*, in THE AMERICAN COURTS: A CRITICAL ASSESSMENT 303, 310 (John B. Gates & Charles A. Johnson eds., 1991); Murphy & Tanenhaus, *supra* note 55.

57. See generally CHARLES A. JOHNSON & BRADLEY C. CANON, JUDICIAL POLICIES: IMPLEMENTATION AND IMPACT (1984). See also Petrick, *supra* note 54, at 7; Jeffery J. Mondak, *Policy Legitimacy and the Supreme Court: The Sources and Contexts of Legitimation*, 47 POL. RES. Q. 675, 690 (1994) (concluding that while the association of a policy with the Court can augment the policy's legitimacy, "the magnitude of this effect is determined by the interaction of numerous contextual factors").

To name but a few examples: Vice President Gore acquiesces to the Court's ruling in *Bush v. Gore*.<sup>58</sup> Local boards refuse to acquiesce to the Court's holding in the school prayer cases.<sup>59</sup> Congress follows the amendment route after the Court's decision in *United States v. Eichman*.<sup>60</sup> Line-item vetoes remain on the books long after the Court's decision in *INS v. Chadha*.<sup>61</sup> How to explain these different responses to judicial rulings? Answers to this question must focus on three factors.

First, there is an important distinction between decisions against national institutions and decisions against state and local actors. When the Court strikes down (or narrows) a federal statute, as in *Shelby County*,<sup>62</sup> or cabins the authority of the executive branch, as in *Boumediene v. Bush*,<sup>63</sup> the Justices stake out a position against a national majority. This is a pure *Marbury* question, instances when the Court performs its accepted duty as intended constitutional interpreter vis-à-vis its constitutional partners. This is a very different dynamic from when the Court acts against state and local institutions. For these, the Court deals, at best, with localized majorities, at worst with entrenched factions unwilling to cede their power voluntarily.

Within the national context, the Court is popularly understood as sole interpreter of the Constitution. This is the legacy of *Marbury v. Madison* and the bargain we exacted at the founding. Once the Court determines "what the law is,"<sup>64</sup> all constitutional actors must follow this interpretation. A refusal to comply with a court decision carries risks and costs. Yet think of how many times compliance questions arise at this level. Leading examples counsel in the opposite direction. In *Shelby County*, for example, a near unanimous Congress readily acquiesced to what may charitably be

58. See Vice President Al Gore, Presidential Election Concession Speech (Dec. 13, 2000), <http://www.nytimes.com/2000/12/14/us/43rd-president-his-remarks-gore-says-he-will-help-bush-bring-american-together.html> [<https://perma.cc/873F-F4T2>] ("Now the U.S. Supreme Court has spoken. Let there be no doubt, while I strongly disagree with the court's decision, I accept it.")

59. See LYNDY BECK FENWICK, SHOULD THE CHILDREN PRAY? A HISTORICAL, JUDICIAL, AND POLITICAL EXAMINATION OF PUBLIC SCHOOL PRAYER 132-35 (1989); KENNETH M. DOLBEARE & PHILLIP E. HAMMOND, THE SCHOOL PRAYER DECISIONS: FROM COURT POLICY TO LOCAL PRACTICE 27-28 (1971); William M. Beaney & Edward N. Beiser, *Prayer and Politics: The Impact of Engel and Schempp on the Political Process*, 13 J. PUB. L. 475 (1964).

60. 496 U.S. 310 (1990); see H.R.J. Res. 79, 104th Cong. (1995); S.J. Res. 31, 104th Cong. (1995).

61. See LOUIS FISHER, CONG. RESEARCH SERV., CRS REPORT NO. 87-389, LEGISLATIVE VETOES ENACTED AFTER CHADHA (1987); Louis Fisher, *Judicial Misjudgments About the Lawmaking Process: The Legislative Veto Case*, 45 PUB. ADMIN. REV. 705, 705 (1985); Elliot H. Levitas & Stanley M. Brand, *The Post Legislative Veto Response: A Call to Congressional Arms*, 12 HOFSTRA L. REV. 593, 616 (1994).

62. See *Shelby County v. Holder*, 133 S. Ct. 2612, 2631 (2013).

63. See 553 U.S. 723 (2008).

64. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

described as a farcical reading of precedent. In *Sebelius*, Congress similarly relented to the Court's curious reading of the Affordable Care Act. Consider also *City of Boerne v. Flores*, where the Court struck down important aspects of the Religious Freedom Restoration Act (RFRA), a statute enacted directly in response to a prior judicial interpretation.<sup>65</sup> What is interesting and remarkable in this case is not whether the Court has the power to reign in Congress as it did, but why a nearly unanimous Congress acquiesces to the view of six Justices of the Supreme Court. This is no idle sentiment. Think also of the Nixon tapes and the Court's decision that he, the President of the United States, must turn them over.<sup>66</sup> Why should President Nixon comply, and what would happen if he didn't?<sup>67</sup> Or farther back: think of the much-vilified Hughes Court during the New Deal, for example. For all the bad print directed at that judicial era, isn't it remarkable that questions of compliance hardly arose? Instead, President Roosevelt reacted politically and sought to curb the Court's excesses.<sup>68</sup> Think, of course, of *Marbury* itself.<sup>69</sup>

When it comes to the Court's power against state and local governments, a different story arises. In the school prayer and school desegregation cases,<sup>70</sup> for example, the affected actors can argue that they can read the constitutional text as well as the Court, and don't recall agreeing to those things the Court portends that they did.<sup>71</sup> These cases pose crucial questions about the structure of our federal government; the Court must have the power to invalidate state and local laws because the stability of the central government depends on it. Justice Holmes's words are particularly poignant in this context: "I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the

65. 521 U.S. 507, 511-13 (1997).

66. See *United States v. Nixon*, 418 U.S. 683, 713-14 (1974).

67. Compare President Jefferson's conduct in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), and the Court's response in *Stuart v. Laird*, 5 U.S. (1 Cranch) 299 (1803). See RICHARD E. ELLIS, *THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC* (1971); WILLIAM E. NELSON, *MARBURY V. MADISON: THE ORIGINS AND LEGACY OF JUDICIAL REVIEW* 63 (2000).

68. See generally WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* (1995).

69. See Jack Knight & Lee Epstein, *On the Struggle for Judicial Supremacy*, 30 *LAW & SOC'Y REV.* 87, 88 (1996).

70. E.g., *Brown v. Bd. of Educ.* 349 U.S. 294 (1955); *Engel v. Vitale*, 370 U.S. 421 (1962); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963).

71. See, e.g., JOHNSON, *supra* note 54; GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 9-36 (1991).

laws of the several States.”<sup>72</sup> During his travels around and ultimate report on the young American nation, Alexis de Tocqueville recognized a similar structural dynamic at play. As he wrote, “nowhere is it more necessary to constitute the judicial power strongly than in confederated peoples, because nowhere are there individual existences that can struggle against the social body greater and in a better state to resist the use of the material force of the government.”<sup>73</sup>

Yet local majorities need not follow the Court’s lead, and few mechanisms exist to enforce the Court’s ruling.<sup>74</sup> In an infamous voting rights case, *Giles v. Harris*, Justice Holmes made precisely this point:

The bill imports that the great mass of the white population intends to keep the blacks from voting. To meet such an intent something more than ordering the plaintiff’s name to be inscribed upon the lists of 1902 will be needed. If the conspiracy and the intent exist, a name on a piece of paper will not defeat them. Unless we are prepared to supervise the voting in that state by officers of the court, it seems to us that all that the plaintiff could get from equity would be an empty form.<sup>75</sup>

More crucially, imagine what happens in this instance were national public opinion against the local majorities’ view. Clearly, under such a scenario we have no way to make this local majority conform to national values, so these local majorities could go on and defy the “law” with impunity. When in disagreement with the Court, a localized majority has much incentive to disobey general rulings until specific litigation is brought to bear on their jurisdiction. In turn, this incentive often ensures further non-compliance, because litigation exacts a heavy cost on those individuals willing to test the mettle of local actors and institutions. This is the clear lesson of the difficult road to enforce the Fifteenth Amendment, and which culminated in the Voting Rights Act of 1965.<sup>76</sup>

In sum: a number of factors, such as local elites, the specific social and political context in question, and the specific demands of the Court’s

72. OLIVER WENDELL HOLMES, *Law and the Court*, in COLLECTED LEGAL PAPERS 295–96 (1920). For a modern exposition, see Bradley C. Canon, *Defining the Dimensions of Judicial Activism*, 66 JUDICATURE 236, 241 (1983) (“The [counter]majoritarian dimension [of judicial activism] also includes Supreme Court nullification of state laws, state constitutional provisions, and local ordinances. Such voidings arguably are less offensive in principle. A federal system requires some mechanism for reviewing local legislation in order to retain federal supremacy in specified areas.”).

73. TOCQUEVILLE, *supra* note 22, at 142.

74. Hoekstra & Segal, *supra* note 55, at 1096 (“[W]e find that the more immediate the situation is to one’s personal life, the less likely one is to defer to the judgment of some other source, even one thought to be highly credible.”).

75. 189 U.S. 475, 488 (1902).

76. See generally John Doar, *The Work of the Civil Rights Division in Enforcing Voting Rights Under the Civil Rights Acts of 1957 and 1960*, 25 FLA. ST. U. L. REV. 1 (1997).

ruling on the relevant actors, *inter alia*, determine whether the Court will be obeyed or defied.<sup>77</sup> In relevant contrast, when the Court speaks to national institutions in the name of national majorities, public opinion may turn on any defying institution quickly.<sup>78</sup>

Second, compliance will vary depending on the issue in question.<sup>79</sup> Not all cases are alike. For issues that the public perceives as having right or wrong answers, such as abortion and affirmative action, the Court's power is at its lowest ebb.<sup>80</sup> More mundane issues, or issues that fail to engage the public similarly, offer the Court with a much wider space within which to exact compliance.

Third, compliance is influenced by whatever interpretive space an institution is proffered to decide constitutional issues by itself. This understanding of interpretive authority is known as departmentalism, and it presumes that each institution is called to interpret the Constitution as part of its institutional duties. For support, turn briefly to Chief Justice Marshall's opinion in *Marbury*. Recall the three examples he offered at the end of the opinion to clinch his conclusion. Conveniently enough, all three examples involved judicial questions that belonged squarely within the judicial branch. For example, he wrote, "It is declared that 'no tax or duty shall be laid on articles exported from any state.'" "Suppose," he continued, "a duty on the export of cotton, of tobacco, or of flour; and *a suit instituted to recover it*. Ought judgment to be rendered in such a case? [O]ught the judges to close their eyes on the constitution, and only see the law[?]"<sup>81</sup> His third example was more specific. He first offered the relevant constitu-

77. See, e.g., sources cited *supra* note 57; see also Barry Friedman, *When Rights Encounter Reality: Enforcing Federal Remedies*, 65 S. CAL. L. REV. 735, 775 (1992) ("Even if 'defiance' strictly speaking is not at issue, majoritarian dissatisfaction with judicial decisions seems to make itself felt strongly enough that judges get the message and alter the nature of the underlying rights."); cf. Thomas R. Marshall, *Policymaking and the Modern Court: When Do Supreme Court Rulings Prevail?*, 42 W. POL. Q. 493, 503 (1989) ("The modern Court's ability to hand down enduring decisions is very closely linked to the Court's unanimity, the ruling's ideology, and to the distribution and attentiveness of mass public opinion.").

78. For a similar understanding, which concludes that the most controversial judicial decisions after 1973 have not been against national lawmaking majorities, but state governments, see Martin Shapiro, *The Supreme Court from Early Burger to Early Rehnquist*, in *THE NEW AMERICAN POLITICAL SYSTEM* 47, 49 (Anthony King ed., 2d ed. 1990). See also Jonathan D. Casper, *The Supreme Court and National Policy Making*, 70 AM. POL. SCI. REV. 50 (1976).

79. See Bradley C. Canon, *The Supreme Court as a Cheerleader in Politico-Moral Disputes*, 54 J. POL. 637, 652 (1992); Jeffery J. Mondak, *Institutional Legitimacy, Policy Legitimacy, and the Supreme Court*, 20 AM. POL. Q. 457 (1992); Murphy & Tannenhaus, *supra* note 55, at 1004-05; see also Adamany & Grossman, *supra* note 55, at 425 (contending that the Court's resiliency against political attacks is due to the fact that it engaged the "dominant noneconomic domestic issues of our time").

80. Canon, *supra* note 79, at 652 ("Politico-moral clashes by their very nature are largely immune to judicial claims of authority or legitimacy.").

81. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 179 (1803) (emphasis added).

tional text: "No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court." Marshall's analysis was particularly illustrative:

Here the language of the constitution is addressed especially to the courts. It prescribes, directly for them, a rule of evidence not to be departed from. If the legislature should change that rule, and declare *one* witness, or a confession *out of* court, sufficient for conviction, must the constitutional principle yield to the legislative act?<sup>82</sup>

These questions have easy answers. Were Congress to enact said statutes, the courts need not give them effect. This is one way to understand the interaction between the Court and Congress over RFRA.<sup>83</sup> With RFRA, Congress not only attempted to override a judicial decision, but went much further: it sought to alter the doctrinal mechanics when applied to neutral statutes of general applicability. This was an easy case for the Court. In this vein, think also of the passive doctrinal stance for questions of foreign policy or the political question doctrine itself. These are pure *Marbury* cases, where each department is best left to interpret those constitutional matters that pertain to the locus of their authority. This position dates back to the early years of the country<sup>84</sup> and has much scholarly support.<sup>85</sup>

### III.

The concept of judicial legitimacy offers an important reminder about the Court and its work. Courts must ensure that their behavior comports with pre-established norms, so relevant publics will do as the courts ask. A

82. *Id.*

83. See generally 42 U.S.C. §§ 2000bb–2000bb–4 (2016).

84. See Letter from Thomas Jefferson to Mrs. John Adams (Sept. 11, 1804), in 11 THE WRITINGS OF THOMAS JEFFERSON 50 (Albert E. Bergh ed., 1905) ("But nothing in the Constitution has given them a right to decide for the Executive, more than to the Executive to decide for them. Both magistracies are equally independent in the sphere of action assigned to them."). But see Wallace Mendelson, *Jefferson on Judicial Review: Consistency Through Change*, 29 U. CHI. L. REV. 327 (1962) (concluding that Jefferson's own view was not always against a theory of pure judicial review, as it seems he changed his mind in order to justify executive refusal to execute judicial decisions arising from the Alien and Sedition Acts).

85. See, e.g., Walter Dellinger & H. Jefferson Powell, *Marshall's Questions*, 2 GREEN BAG 2D 367, 376 (1999) ("Marshall's more original thought was his inscription into the constitutional jurisprudence of the Supreme Court of the idea that the courts are not the only institutions whose province and duty includes the exposition and interpretation of the law."); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994); Mark Tushnet, *Marbury v. Madison and the Theory of Judicial Supremacy*, in GREAT CASES IN CONSTITUTIONAL LAW 19 (Robert P. George ed., 2000). This is perhaps the received view. As Professor Paulsen asks, "[a]re we really all 'departmentalists' now? Will nobody defend judicial supremacy anymore?" Michael Stokes Paulsen, *Protestantism and Comparative Competence: A Reply to Professors Levinson and Eisgruber*, 83 GEO. L.J. 385, 385 (1994).



lack of legitimacy signals the death knell of judicial authority. As this Essay illustrates, however, judicial legitimacy is a trope deployed by judges in the pursuit of specific outcomes. It does very little interpretive work on its own. It is a warning about the future and how a judicial outcome may be received, yet a warning that operates more as a boogeyman. It is a criticism, a call for restraint, yet lacking in empirical support.

Notably, calls for safeguarding the legitimacy of the Supreme Court have risen markedly in recent years. Since 1954 and the *Brown* ruling, the Justices have referenced warning about judicial legitimacy seventy-one times, and only nine times in the prior 164 years.<sup>86</sup> Chief Justice Roberts's warnings fall squarely within this trend. His warnings also find a receptive audience within the Law of Democracy, an area once dominated by Justice Frankfurter and the political question doctrine. But Justice Frankfurter was wrong about the risks posed by redistricting questions to the legitimacy of the Court. He was wrong both as a matter of diffuse and content legitimacy. There is nothing to suggest the narrative will change and Chief Justice Roberts will be proven right.

Chief Justice Roberts is wrong about diffuse legitimacy. Recall Justice Frankfurter's worry that "[a]ppportionment battles are overwhelmingly party or intra-party contests."<sup>87</sup> The authority of the Court springs from public support, a feeling that "must be nourished by the Court's complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements."<sup>88</sup> These were the redistricting cases. This was *Baker v. Carr*. This was also, more pertinently, *Reynolds v. Sims*.<sup>89</sup> Yet these cases represent a triumph of judicial statesmanship, a needed incursion into questions of politics.<sup>90</sup> These cases inform John Hart Ely's ground-breaking theory of judicial review.<sup>91</sup> Chief Justice Roberts has no reason to believe that a decision in the political gerrymandering cases would harm the legitimacy of the Court. The Court has decided extreme partisan cases, where our "intelligent man on the street" cannot help but conclude that the Court is taking sides in partisan controversies. This was *Bush v. Gore*, a case that did not harm the

86. Farganis, *supra* note 51, at 207.

87. *Baker v. Carr*, 369 U.S. 186, 324 (1962) (Frankfurter, J., dissenting)

88. *Id.* at 267.

89. See Luis Fuentes-Rohwer, *Domesticating the Gerrymander: An Essay on Standards, Fair Representation, and the Necessary Question of Judicial Will*, 14 CORNELL J. L. & PUB. POL'Y 423 (2006).

90. See Schuck, *supra* note 23, at 1381.

91. See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

legitimacy of the Court. For a more recent example, look no further than *Janus v. American Federation of State, County and Municipal Employees, Council 31*, the public-sector union case from this term.

In *Janus*, the Justices return to an old question. The issue is whether public-sector employees who are not union members can be required to pay “fair share” fees to support contract negotiations for all employees. Forty years ago, in *Abood v. Detroit Board of Education*,<sup>92</sup> a unanimous Court upheld these fees under the First Amendment. The plaintiff in *Janus* is asking the Court to overrule *Abood* and strike down all mandatory union fees as forced speech. But this question is “old” in a more recent way. A similar challenge to “fair share” fees came to the Court three years ago, in *Harris v. Quinn*,<sup>93</sup> but the Court concluded that the plaintiffs in the case were not public-sector employees. The issue came back a year later, in *Friedrichs v. California Teachers Association*,<sup>94</sup> but Justice Scalia’s death left the Justices deadlocked 4–4. The issue is now back for the third time in three years.

The “intelligent man on the street” is paying attention and he knows what he sees. The litigation in *Janus* is part of a “multipronged, multi-tiered” legal strategy that has “not just brought labor to the brink of crisis but threatened the Democratic Party as well.”<sup>95</sup> This is a judicial “[p]ower [p]lay [a]gainst [l]abor.”<sup>96</sup> This is a case about the future of labor and all the political influence it wields in national politics. At its core, this is a case about Republicans and Democrats, and the “intelligent man on the street” knows that. So should Chief Justice Roberts:

If that concern applies in any case, it applies here, where the Court is being asked by avowedly partisan groups to wipe away a 40-year-old precedent, which has been repeatedly reaffirmed, as part of a long-term political campaign. This background heightens the need for vigilance by the Court to zealously protect its apolitical role. Otherwise, the “intelligent man” will reach only one conclusion: that the Court is being asked to reach a political decision because the interests involved in that campaign think—and have telegraphed and telegraphed and telegraphed—that, based on this Court’s changed membership, a 5-4 victory awaits them. Accepting that invitation on these terms risks causing that “very

92. 431 U.S. 209 (1977).

93. 134 S. Ct. 2618 (2014).

94. 136 S. Ct. 1083 (2016) (mem.).

95. Noam Scheiber & Kenneth P. Vogel, *Behind a Key Anti-Labor Case, a Web of Conservative Donors*, N.Y. TIMES (Feb. 25, 2018), <https://www.nytimes.com/2018/02/25/business/economy/labor-court-conservatives.html> [http://perma.cc/2PJE-9KC7].

96. Linda Greenhouse, Opinion, *The Supreme Court’s Power Play Against Labor*, N.Y. TIMES (Mar. 1, 2018), <https://www.nytimes.com/2018/03/01/opinion/supreme-court-labor-unions.html> [http://perma.cc/H4FY-HMQE].

serious harm to the status and integrity of the decisions of this Court in the eyes of the country.”<sup>97</sup>

Notably, the Chief Justice asked very few questions at the oral argument in *Janus*.<sup>98</sup> But if he were really worried about the legitimacy of the Court and its standing in the public eye, this issue would have been away from the Court’s docket long ago.

Chief Justice Roberts is also wrong about content legitimacy. This is a real abstract worry. Will the affected publics acquiesce to the Court’s demands? The modern answer, in a word, is yes. Think here about the aftermath of the reapportionment revolution, a time when the Court declared unconstitutional at one time or another a super majority of seats in the U.S. House of Representatives and most state legislatures. The reaction from the states was nothing short of remarkable. The “one person, one vote” revolution spread like a wildfire across the United States. Of particular interest is the fact that Justice Frankfurter had the better argument: this equipopulation standard was a judicial creation in no way connected to the Constitution.<sup>99</sup> Or in Justice Harlan’s famous words:

Stripped of aphorisms, the Court’s argument boils down to the assertion that appellees’ right to vote has been invidiously “debased” or “diluted” by systems of apportionment which entitle them to vote for fewer legislators than other voters, an assertion which is tied to the Equal Protection Clause only by the constitutionally frail tautology that “equal” means “equal.”<sup>100</sup>

But this hardly matters. “The short-term response,” according to Robert McCloskey in the *Harvard Law Review* foreword of that year, “has been nothing short of astonishing.”<sup>101</sup>

Think also about the aftermath of the *Shelby County* case, when the Court struck down a vital section of the Voting Rights Act under a dubious if not farcical reading of prior cases. Unremarkably, congressional acquiescence followed. Better yet: think of the last time congressional majorities pushed back against the Court? RFRA provides one such example. In *Employment Division v. Smith*,<sup>102</sup> the Court held that the First Amendment is

97. Brief of Senators Sheldon Whitehouse and Richard Blumenthal as Amici Curiae in Support Of Respondents at 22, *Janus v. Am. Fed’n of State, Cty. & Mun. Emps.*, Council 31, No. 16-1466 (U.S. Jan. 18, 2018), 2018 WL 509655 (quoting Transcript of Oral Argument at 38, *supra* note 1).

98. See generally Transcript of Oral Argument, *Janus*, No. 16-1466, 2018 WL 1050563.

99. For a discussion on this point, see Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Reynolds Revisited*, in ELECTION LAW STORIES 21, 49–52 (Joshua A. Douglas & Eugene D. Mazo eds., 2016).

100. *Reynolds v. Sims*, 377 U.S. 533, 590 (1964) (Harlan, J., dissenting).

101. Robert G. McCloskey, *The Supreme Court, 1961 Term—Foreword: The Reapportionment Case*, 76 HARV. L. REV. 54, 56 (1962).

102. 494 U.S. 872, 878 (1990).

not violated when a prohibition on a religious exercise is not the object of state regulation but an incidental effect of a generally applicable and otherwise valid provision. More specifically, the Court concluded that the religious motivation for using peyote did not exempt Smith from the reach of a criminal law not specifically directed at his religious practice. Congress overruled *Smith* under and commanded courts to apply a strict scrutiny test when the government burdens religion. In other words, Congress determined that the government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, unless it demonstrates that application of the burden to the person is "in furtherance of a compelling governmental interest; and . . . is the least restrictive means of furthering that compelling governmental interest."<sup>103</sup> This was the Religious Freedom Restoration Act. But in *City of Boerne v. Flores*, the Court struck down portions of the Act as applied to state and local actors. This is a remarkable act. *City of Boerne* not only refused to grant religion a protected status from substantial governmental burdens, but it also contravened a nearly unanimous congressional act.<sup>104</sup> Six Justices brought Congress to its knees. Talk then shifted to the higher ground of constitutional amendment.<sup>105</sup>

Justice Kennedy is the deciding vote in *Gill*, and he is clearly worried about content legitimacy.<sup>106</sup> It is less clear whether the Chief Justice is similarly worried. But he needn't worry. Ironically, Chief Justice Roberts *should* worry about the growing perception that his vote in *Sebelius*—what is known as the "Roberts flip"—was driven by strategic considerations. He should worry, in other words, that the public comes to understand the Court as any other political institution.<sup>107</sup> But even then, the worry is relatively small. Judicial legitimacy is far more secure than concerned Justices let on.

103. 42 U.S.C. §2000bb-1(b)(1)–(2) (2016).

104. *City of Boerne v. Flores*, 521 U.S. 507 (1997) (striking down RFRA, 42 U.S.C. § 2000bb)).

105. The flag burning controversy also proves illustrative. Soon after *United States v. Eichman*, 496 U.S. 310 (1990), the talk soon shifted to the higher language of constitutional amendment. See *supra* note 60 and accompanying text.

106. See Luis Fuentes-Rohwer, *Who's Afraid of the Hated Political Gerrymander?*, 104 KY. L.J. 561 (2015).

107. This is a way to make sense of the Chief Justice's apparent switch in the recent *Artis v. District of Columbia*, 138 S. Ct. 594 (2018). In *Artis*, the Chief Justice joined the court's moderate wing in a rather mundane supplemental jurisdiction case, leading to much speculation about the reasons for his vote. See Linda Greenhouse, *The Chief Justice, Searching for Middle Ground*, N.Y. TIMES (Feb. 1, 2018), <https://www.nytimes.com/2018/02/01/opinion/chief-justice-roberts-middle.html> [http://perma.cc/RHR8-Z283]. Justice Gorsuch in dissent raised the specter of federalism loudly and often. Gorsuch worried that "we've wandered so far from the idea of a federal government of limited and enumerated powers that we've begun to lose sight of what it looked like in the first place." *Artis*, 138 S. Ct. at 617 (Gorsuch, J., dissenting). On this view, this was the latest installment of the ongoing

## CONCLUSION

Chief Justice Roberts joins a modern chorus of Justices raising concerns over the concept of judicial legitimacy. But to answer a question raised earlier, there is very little the Court can do to compromise its legitimacy. The better question is why he raises this concern at all, as often as he does? What lies behind these warnings? It may be that he is truly concerned. But once we take a look at his body of work, from *Citizens United* to *Shelby County* to *Janus*, the public sector union case, it is hard to believe him. This is clearly a selective, outcome-driven concern. But more importantly, there is nothing in the political gerrymandering cases that should concern him. History is on his side.

debate over our federalism. Why does the same Justice who wrote the Court's opinion in *Shelby County* and hailed the virtues of our federalism and the "equality of states" doctrine join the majority in *Artis*?